SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 123

EMMA D. LYNN,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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THOMAS P. FORD, JR.,
First Assistant Prosecutor,
BARRY H. EVENCHICK,
Assistant Prosecutor,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-0611-12

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Counter-Statement of the Case

(Defense Counsel's Opening to the Jury)

During his opening address to the jury, counsel for the defendant stated:

> ". . . there is a very strong and vehement denial by the defendant in this case that she possessed any narcotic drug that is laid in the indictment or referred to by the prosecutor. We will deny vehemently that this room where it is alleged that a narcotic drug was found, was not at that time the bedroom of the defendant. As a matter of fact, the defense will prove to you that this room, like one or two other rooms in this house, was rented out, and it disclosed that a particular James Brewer, together with his fiance, occupied that room, anticipatory to renting the entire first floor of this house from Emma Lynn.
>
> We will prove to you that the Lynns just prior to that had been down in Louisville, Kentucky, in regard to some inheritance that her two children got, one, Sylvia and Bill, and that they had come back to Newark and they were going to take all of their belongings down to Louisville, and in the meantime this room on the first floor, together with other rooms but this particular one—was rented by James Brewer. And, as a matter of fact, this particular house at 86 West Kinney Street is not even owned by the defendant but through inheritance it is owned by her daughter Sylvia and her son Bill. But she was there that morning when members of the Sheriff's Department came pursuant to the mandate of a search warrant. There isn't any question about it. And they came and they had a right by virtue of the

provisions of the search warrant to make a search, and they did make a search, and they made a search of this bedroom that he is speaking of, that he calls a bedroom. But it was a separate and distinct rental to Brewer." (3a-4a)

(Defense Counsel's Summation)

In the course of his summation to the jury, defense counsel stated:

"By the way, members of the jury, there is no criticism here of the police in what they did. They all went there and performed their respective functions and duties, but I do seriously disagree with their version that because it was found in a pocketbook that belonged to Sylvia, that that factually gives them the basis to lodge a charge against Mrs. Lynn, and it turns out that you, as a matter of circumstance, can take into account why Mrs. Lynn? Was the investigation lacking in some respect? She wasn't even the owner of the house because it was stipulated with the prosecution, in lieu of submitting the deed and the will and the tax bills, that the ownership of 86 West Kinney Street, and I think the testimony was, as well as 71, as well as 82, lies in Sylvia Lynn and her brother William, left to them by their grandmother. The grandmother left the properties to her two grandchildren.

Now, you have got to stretch the elastic pretty far to embrace as a possessor of a narcotic and to be convinced beyond a reasonable doubt that Emma possessed this narcotic. You have got to cross a lot of bridges before you do that. And I don't think that that falls within the category of proving a case beyond a reasonable doubt as against this defend-

ant, Emma Lynn. I cannot, under our system of jurisprudence, tell you that I can answer the argument of Mr. Ronco when he speaks to you and addresses you after I have terminated my discourse to you because under our system of jurisprudence I cannot speak any more. This is the last opportunity that I have in the case, and I don't want you, members of the jury, to get the impression that I am any more intelligent than you are. All I ask you to do is to apply your own worldly experiences to this case. There are divergent circumstances here.

I told you that there was no duty upon the defendant to produce any evidence in this case.

You talk about reasonable doubt. Not only is there a lack of reasonable doubt in this case but I think that the defendant has proved her innocence—

The defendant came forward with evidence and showed all the probabilities that might have occurred here in this case. What else can defense counsel do in a case of this kind where he comes into court and subpoenas and brings into court everyone who had some particular, specific knowledge about this case with the extraordinary speculation and gamble when I took the responsibility of calling Hertig, a member of the Sheriff's raiding staff? The very fact that Mr. Hertig said that he saw those two individuals come out of that room, does that give weight and credence to the concept and the contention of the defects? I do not deny nor dispute that there was a narcotic in that room, but it was not the defendant's Emma Lynn's. It was the narcotic indulger, the deceased, Mr. Brewer. He is the one who brought that narcotic into that room. It was his. And I have pity for him. I don't like a pusher or a seller or anyone else, but an addict to me is like a man who has diabetes. He has got a disease.

Mr. Ronco: Your Honor, I think counsel is now going far afield with the evidence adduced in this case. He is injecting himself.

The Court: Yes. Again, don't do it, Mr. Bozza. You are not on trial. You are an advocate." (6a-8a)

ARGUMENT

POINT I

Neither the comments of the assistant prosecutor during summation nor those of the Court in its charge was violative of the defendant's constitutional right to remain silent and to be free from compulsory self-incrimination.

In support of the argument that defendant was denied her rights under the Fifth and Fourteenth Amendments of the United States Constitution, principal reliance is placed upon the decision of this Court in *Griffin* v. *State of California,* 380 U. S. 609 (1965), rehearing denied 381 U. S. 957 (1965). Clearly, that decision forbids comment by the prosecution or the court upon the failure of the accused to testify in his own behalf. While the State acknowledges the holding in *Griffin,* it submits that the defendant's efforts to place herself within the protective scope of that decision are misguided. *Griffin* surely was not intended to provide a haven for one who would seek to testify through counsel's opening or closing to the jury while at the same time remaining off the witness stand during the course of the trial. Such is precisely what defendant did in the present case.

As noted, *supra,* defense counsel told the jury in detail that the defendant would prove that she was not the occu-

pant of the room in which the narcotics were found and that she in fact had knowledge that it had been rented to a person named James Brewer. He also told the jury in summation that he did not dispute the fact that there were narcotics in the room but only disputed the fact that they belonged to the defendant. When counsel used the word "I" he spoke for the defendant as if it were the defendant herself who was speaking. Therefore, the obvious tactical effort of counsel to minimize the inferences that the jury might reasonably be expected to have drawn from the defendant's failure to support the thesis of her case as outlined in counsel's opening invited the prosecutor's comment. Under the circumstances, the comment cannot be regarded as prejudicial evidence. *State* v. *Lowery,* 49 N. J. 476, 486 (1967); *Mash* v. *People,* 220 Ill. 86, 77 N. E. 92, 94 (1906); *State* v. *Fioravanti,* 46 N. J. 109 (1965), *certiorari* denied 384 U. S. 919, 86 S. Ct. 1367, 16 L. ed. 2d 440 (1966).

The state further urges that the comments of the assistant prosecutor did not relate to the critical issue of whether or not the defendant possessed the narcotics. Realistically, the comment pertained to the question of the ownership of the house in which the narcotics were found and to the question of who occupied the specific room in the house in which the narcotics were found. The ownership of the house had already been decided by virtue of a stipulation between counsel (6a). It is seen that that question was really not at issue. The basic reason for the comment was to discredit or to challenge the credibility of a witness named Mrs. Black, who had earlier testified at trial that she observed someone other than the defendant place the narcotics in a pocketbook (4a). There really was no comment by the assistant prosecutor on the failure of the defendant to deny possession of narcotics.

When the court charged the jury, it observed that the defendant's principal defense was that she did not know what was in the pocketbook and therefore did not possess it. The court was referring to what the defense counsel had argued in his opening and summation. Thus, *e.g.*, the defense had opened to the jury by stating "there is a very strong and vehement denial by the defendant in this case that she possessed any narcotic drug . . ." (3a). The court was merely referring to what defense counsel had said and in no way was commenting on the failure of the defendant to take the stand.

The State submits, finally, that even if it be true that the comments here under consideration in someway violated *Griffin, supra,* an appellate court could nevertheless find beyond a reasonable doubt that the comment did not affect the verdict of the jury. There was abundant evidence to support the verdict of the jury and there was virtually but one isolated reference by the assistant prosecutor to what the defendant had not said. This case can be contrasted with the situation in *Chapman* v. *California,* —— U. S. ——, 17 L. ed. 2d 705 (1967), where there had been a "machine-gun repetition" of prejudicial comments on the failure of the defendant to testify. Should this Court determine that there was invalid comment this case might appropriately be remanded to the New Jersey Appellate Courts for consideration of whether there was harmless error. See, *United States* v. *Wade,* —— U. S. ——, 18 L. ed. 1149, 1166 2d (1967); *Gilbert* v. *California,* —— U. S. ——, 18 L. ed. 2d 1178, 1187 (1967).

CONCLUSION

For the reasons expressed herein, it is respectfully urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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[APPENDIX FOLLOWS]